UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 32

FAA CONCORD T, INC., DBA CONCORD TOYOTA, **Employer,** MACHINISTS AUTOMOTIVE TRADES DISTRICT LODGE NO. 190, MACHINISTS LOCAL 1173, **Petitioner.**	**Case:** 32-RC-255130

EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION TO OPEN AND COUNT DETERMINATIVE CHALLENGED BALLOT AND DECISION AND DIRECTION OF ELECTION UPON WHICH IT WAS BASED

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REQUEST FOR REVIEW

Pursuant to section 102.67 of the National Labor Relations Board's ("Board") Rules and Regulations ("R&R"), the Employer FAA Concord T, Inc., dba Concord Toyota (hereinafter "Company" or "Employer") seeks review of the Decision of the Regional Director's Decision To Open And Count Determinative Challenged Ballot ("Decision") issued by the Region 32 Regional Director ("RD") on March 26, 2020, and the underlying incorporated Decision and Direction of Election ("DDE") on which the Decision was based. The Employer requests that the Board sustain the challenge to the ballot of Internal Advisor William Ortega and dismiss the Petition. In the alternative, the Employer requests that the Board reverse the Decision and the DDE and remand to the Board to apply the correct legal standard.

I. SUMMARY OF EVIDENCE AND ARGUMENT

Two different unions have represent employees for many years in two different bargaining units in the Service Department of Concord Toyota, a franchised new car dealership in Concord, California. (HT 294:20-22; and the Collective Bargaining Agreement ("CBA"), received into evidence as E-3.) The Teamsters represent a group of blue-collar, unskilled (non-technical) staff who are porters, detailers, and shuttle drivers. (HT 70:21 – 71:6; and E-3.)[1] The Machinists represent a group of skilled blue-collar workers (automotive service and repair technicians) and the parts employees that directly support the technicians in providing them with the parts and supplies to do the service/repair. (HT 18:4-5; and E-3.) There are some 50 employees already represented by the Union in the Service Department of the Employer. No other department has a union workforce.

Also in the Service Department are a group of white-collar retail salespeople known as Retail Service Advisors (Service Advisors and Floating Advisors) who sell to third-party customers in the Service Drive who come to the Employer's Service Drive to have their vehicles repaired and/or serviced. (HT 30:5-24 and 33:15-24.) There is also another position in the

[1] Reference is made herein to the hearing transcript ("HT") from the Unit Determination Hearing held on February 5, 2020, and the HT constitutes the evidence of the Employer in this matter.

Service Department called an Internal Advisor (who is not a salesperson at all) but who works directly in the Service Department Office (not the Service Drive). In the Service Department, there are also other office workers such as the Cashiers, the Receptionist, the Warranty Administrator and the Used Car Manager. The Internal Advisor administers the new car preparation process (new car PDI) and Used Car Reconditioning for the new and used car departments of the Dealership. The Internal Advisor is essentially a Used Car Reconditioning Manager and New Car Inventory Manager as his job is to make sure that new and used cars owned by the Employer are ready for retail sale (HT 189:16 – 190:10.) The Internal Advisor, the Cashiers and the Warranty Administrator do not do physical labor and do not sell anything, but instead do only paperwork and computer work. (HT 58:17 – 59:24.)

In a rank attempt at gerrymandering, Petitioner Machinists Union has cherry-picked just some of a functionally-integrated group of Service Department employees to vote in an election—an *Armour-Globe* unit according to the Union. This selected unit consists only of the Service Advisors and Internal Advisor (9 total employees) in order to select only those employees the Union believes will support it in an election (the "Cherry-picked" employees). The Machinists Union has left out of its group of cherry-picked employees, the other Service Department employees it believes will not support the Union in an election (the "remnant" employees) which consist of the Service Department Cashiers, Receptionist and Warranty Administrator (six total employees).

Both the cherry-picked employees and the remnant employees are non-skilled, non-technical white-collar staff who have next to nothing in common with the skilled, technical, shop technicians and the supporting parts employees who are the overwhelming majority of the persons covered by the subject CBA. (*See* E-3.) The current bargaining unit represented by the Machinists has approximately 50 employees in it. (HT 70:24 – 73:5.) The Machinists Union wants to add only nine more (eight sales people and one new/used car admin) to a group of fifty blue-collar auto technicians and parts technicians, while leaving out the remaining six Service Department employees. (*Ibid.*) Granting what Petitioner seeks will create a situation where the

technicians will be able to bargain for contract terms that will be suitable for them as skilled technicians, but not for the white-collar minority despite any terms that may be unsuitable for their significantly different types of jobs. The petitioned-for unit fails on several grounds.). The Board has a long history of excluding unskilled workers from units of highly skilled employees such as those in the existing unit. *See, e.g., Avco Lycoming Division,* 173 NLRB 1199 (1968) (technical employees use independent judgment and specialized skills and training to accomplish highly technical work); *Nevada-California Electric Corp.,* 20 NLRB 79 (1940) (excluding clericals from unit of linemen and electricians because interests are different and no evidence union ever bargained for both groups); *cf. Mercy Catholic Medical Center,* 365 NLRB No. 165, slip op. at 1, n. 2 (Dec. 16, 2017) (denying request for review and excluding OR Technicians as technical employees from a non-professional bargaining unit).

First, it fails because the petitioned-for employees do not have an internal shared community of interest. The petitioned-for employees include Service Advisors and Floater Advisors, and an Internal Advisor. The sole job of the Service and Floater Advisors is to sell directly to retail customers who bring in their vehicles to the Service Department. They do a visual inspection of the vehicle looking for things to sell to the customer. (HT 34:19 – 35:2.) They are paid a small minimum wage and the majority of their earnings are from commissions based on what they sell individually to customers. (HT 95:11-22.) In contrast, the Internal Advisor does what his names suggests – works directly with internal departments, especially the used car and new car departments and handles orders received from them for service and repair of vehicle owed by the dealership. (HT 172:3-24 and 182:7-19.) In other words, the Internal Advisor is the administrative employee that gets new and used cars coming into the dealership through the preparation for sale process in terms of administrative tasks. The actual recondition is actually done by outside vendors (third-parties). Because of the stark differences between the Service/Floater Advisors and the Internal Advisor, there is no shared community of interests between them.

Second, the petitioned-for unit fails as an appropriate unit to add to the existing Machinists Unit because the petitioned for Unit does not share a community of interests with the technicians and parts advisors. In fact, about all they share in common is a loose functional integration because they are all part of the Service Department.

Third, because the distinct community of interests shared between the petitioned for unit and the remnant employees (Cashiers, Receptionist and a Warranty Administrator) is so strong, that community of interests outweighs any similarities and/or functional integration between the petitioned-for employees and the existing service and parts technicians. All of the unrepresented employees are part of a functionally integrated group that processes paperwork for the sales of service and repairs of vehicles, ensuring that the sale results in third-party payment to the dealership from either customers or the factory (if warranty work).

Fourth, the petitioned for unit fails because including the petitioned-for employees within the collective bargaining unit would contravene established Board precedent. Historically, the Board has included mechanics, tire installers, and brakemen, for instance, while excluding office clerical employees, Cashiers, and salesmen from a unit appropriate for the purposes of collective bargaining. Doing otherwise in this case would not only violate that precedent but also plain common sense. The petition would leave six people from the Service Department excluded from the CBA, while including almost sixty. They include five (5) Cashiers (one of which is a part-time receptionist as well) and one (1) Warranty Administrator. (HT 14:4-16.) These are the people who receive and/or process payments for services and repairs from either customers (the Cashiers) or the factory (the Warranty Administrator) and who handle the return of the vehicle to every customer. (HT 61:7-24.) These people work closely and in conjunction with all the advisors with the full process of intaking a vehicle, servicing, repairing or reconditioning it, getting paid for the work, and then returning the vehicle to the customer.

The Decision and Direction of Election ("DDE") was issued on March 4, 2020. The RD found that there was a shared community of interest between the proposed bargaining unit and the existing unit of technicians and parts, and further found that the Internal Advisor shared a

community of interest with the Retail Service Advisors and thus approved the proposed unit. A manual election was conducted on March 12, 2020, The vote resulted in a count of a total of 7 votes, 4 vote for the Union, 3 votes against the Union, with 1 challenged ballot. One proposed bargaining unit member did not vote. The challenged ballot was that of the Internal Advisor William Ortega.

In her Decision on March 26, 2020, regarding the challenged ballot of William Ortega, the RD ruled that William Ortega's ballot was valid, as he was previously found to be appropriately included in the voting group pursuant to the RD's prior findings in the DDE that was issued on March 4, 2020. As a result, the RD overruled the Employer's challenge to the ballot of Mr. Ortega.

This Request for Review addresses the RD's application of the improper legal standard leading to an improper factual finding. This Request for Review is appropriate for two separate and distinct reasons: (1) The RD's decision raises a substantial issue of law in that the RD applied the wrong legal standard and hence is a departure from officially reported Board precedent; and (2) The RD's DDE decision finding of a shared community of interest between the Internal Advisor and the Retail Service Advisors; and between the Internal Advisor and the existing blue-collar unit of technicians and parts employees is clearly erroneous based on the record and such error prejudicially affects the rights of the Employer.

In short, the RD refused to apply the Board's holding in *The Boeing Company,* 368 NLRB No. 67 (2019) (*Boeing*), and instead decided to apply a pre-*Boeing* decision to come to her Decision. If the RD were to apply the correct Board precedent as the legal standard in examining the appropriateness of including the Internal Advisor in the unit, i.e., *The Boeing Company*, *supra*, the Regional Director should have found that the Employer's challenge to the ballot of William Ortega should be upheld.

II. PROCEDURAL HISTORY

The Union filed its Petition on January 24, 2020. A Unit Determination Hearing was held on February 5, 2020. The DDE was issued on March 4, 2020. A manual election was

conducted on March 12, 2020, resulting in a total of 7 votes: 4 vote for the Union, 3 votes against the Union, and 1 challenged ballot. On March 26, 2020 the RD issued her Decision To Open And Count Determinative Challenged Ballot ("Decision") regarding the challenged ballot of William Ortega.

III. LEGAL ARGUMENT

A. The Board has broad discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.

One of the Board's principal duties is to determine whether employees desire to be represented for collective-bargaining purposes. *See* 29 U.S.C. § 159. The National Labor Relations Act grants employees the right "to bargain collectively through representatives of their own choosing . . . and to . . . refrain from . . . such activities." 29 U.S.C. § 157. When an employer and an employee do not agree that an appropriate unit of employees should be represented for purposes of collective bargaining, the Board has authority to conduct a secret ballot election and certify the results. *Id.* § 159. In making bargaining unit determinations, the "Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." *Id.* § 159(b). The Board has delegated authority to its regional directors to decide representation cases, subject to discretionary Board review. *See id.* § 153(b); 26 Fed. Reg. 3911 (May 4, 1961) (Regional Directors—Delegation of Authority).

Among other grounds, the Board may grant review of a regional director's decision when: there is a substantial question of law or policy that is raised because of a departure from officially reported Board precedent; the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party; or the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error. 29 C.F.R. § 102.67(d).

The Supreme Court of the United States has emphasized that Congress gave the Board "a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). However, with respect to the current issue, the Board itself, in *Boeing*, has recently announced the standards that should be applied when an existing unit is attempted to add additional employees but leave out others. In this regard, the Regional Director must follow the new standards set forth by the Board and refused to do so in her decision.

B. The RD's Decision, relying on the DDE, applied the *Warner-Lambert* standard holding that if the proposed unit shares a community of interest with the existing unit the inquiry ends.

At the commencement of the hearing, and in the DDE, in direct contradiction of Employer's counsel's argument that the appropriate legal standard for this determination is set forth in the 2019 Board decision in *Boeing* , the Hearing Office made it clear that the RD would not apply *Boeing* and instead would make the Unit Determination based on applying the overruled legal standard set forth in the older decisions of *Warner-Lambert Company*, 298 NLRB 993, 995 (1990) and *St. Vincent Charity Medical Center*, 357 NLRB 854 (2011):

> During the election, the Employer challenged the ballot of William Ortega. It is undisputed that Mr. Ortega is employed by the Employer as an internal advisor, a position that I found appropriately included in the voting group. The Employer's position statement essentially disputes my findings in the Decision and Direction of Election that issued on March 4, 2020. Accordingly, I am overruling the Employer's challenge to the ballot of Mr. Ortega.

See Decision at 1.

The RD's Decision referenced her prior DDE which stated:

> Petitioner seeks an *Armour- Globe* self-determination election to add nine full and part time advisors to the existing unit of parts personnel and technicians. (citing *Armour & Co.*, 40 NLRB 1333 (1942); *Globe Machine & Stamping Co.*, 3 NLRB 297 (1937). The advisors consist of three subcategories: (1) service advisor; (2) floating advisor; and (3) and internal advisor.
>
> The Employer maintains that the petitioned-for advisors do not share a community of interest among themselves. Specifically, the Employer contends that the service advisors and the internal advisor do not share a community of interest. The Employer also contends that the advisors do not share a community of interest with the technicians and parts

> employees in the existing unit represented by the Petitioner. The Employer further maintains that the advisors may have a community of interest with other employees including a unit of employees represented by a different labor organization, and/or with remaining employees of the service department who are currently unrepresented such that not including those other unrepresented employees would leave them out and unable to seek representation.
>
> The Petitioner contends that the advisors are a distinct and identifiable voting group that shares a sufficient community of interest with the technicians and parts personnel in the existing unit, such that their inclusion in a unit with technicians and parts employees would be appropriate.
>
> A hearing officer of the Board held a hearing in this matter on February 5, 2020. Petitioner and the Employer appeared at the hearing and the parties filed timely post-hearing briefs with me, which I have duly considered. As evidenced at the hearing and on brief, and explained in more detail below, the only issue before me is the one raised by the petition in this matter, whether the advisors should be allowed to vote in an *Armour-Globe* election to determine if they wish to be included in the existing unit of the Employer's parts personnel and technicians already represented by the Union.

See DDE at 1-2.

> The applicable standard for evaluating the appropriateness of adding additional employees to a preexisting bargaining unit is the Board's *Armour-Globe* doctrine. Under the *Armour-Globe* doctrine, employees sharing a community of interest with an already represented unit of employees may vote whether they wish to be included in the existing bargaining unit. *NLRB v. Raytheon Co.*, 918 F.2d 249, 251 (1st Cir. 1990). An incumbent union may petition to add unrepresented employees to its existing unit through an *Armour- Globe* election if the employees sought to be included share a community of interest with unit employees and "constitute an identifiable, distinct segment so as to constitute an appropriate voting group." *Warner-Lambert Company*, 298 NLRB 993, 995 (1990); *St. Vincent Charity Medical Center*, 357 NLRB 854 (2011). A certifiable unit need only be an appropriate unit, not the most appropriate unit. *International Bedding Company*, 356 NLRB 1336 (2011), citing *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950), enf'd, 190 F.2d 576 (7th Cir. 1951). See also *Overnite Transportation Co.*, 322 NLRB 723 (1996) (the unit sought need not be the ultimate, or the only, or even the most appropriate unit). If the petitioned for unit is appropriate, then the inquiry into the appropriate unit ends. *Boeing Co.*, 337 NLRB 152, 153 (2011).

See DDE at 7-8.

> Given that this is an *Armour-Globe* case, I have primarily analyzed the facts pursuant to the *Warner-Lambert* standard discussed above rather than under the Board's more recent decision in *PCC Structurals, Inc., 365 NLRB No. 160 (2017)*, which overruled *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011). The Board has indicated that *Specialty Healthcare* was not the correct standard for

> determining whether an *Armour-Globe* self-determination election was appropriate, and this remains true after *PCC Structurals*. See *Republic Services of Southern Nevada*, 365 NLRB No. 145, slip op. at 1, fn. 1 (2017); *South Texas Project Nuclear Operating Company*, 2014 WL 5465003 (footnote of Member Johnson finding it inappropriate to apply *Specialty Healthcare* to determine whether a self-determination election is appropriate).

See DDE at 9 fn. 3.

C. The RD's Decision, relying on the DDE, applied the wrong legal standard—the RD should have applied the 2019 *Boeing* decision.

Petitioner and the Hearing Officer have characterized this petition as an *Armour-Globe* case. (*See* HT 21:3-9 and 288:19 – 289:2.) Also, the Hearing Officer stated his and the Regional Director's position that *Warner-Lambert* supplied the standard that should govern in this case, and that *Republic Services of Southern Nevada,* 365 NLRB No. 145 (2017), and *South Texas Project Nuclear Operating Company*, 2014 WL 5465003, supported that position. (HT 21:3-16.) Petitioner has argued that this case is an *Armour-Globe* case and therefore *Boeing* is inapplicable. (HT 288:19 – 289:2.) This is a false distinction. This is just another attempt by Region 32 to ignore the current Board's different views on issues that have been addressed in the past.

However Petitioner and the Hearing Officer wish to characterize and compare *Boeing* in relation to prior Board decisions, it is in fact the case that *Boeing* controls the petition here. Therein, the petitioner sought to create a collective bargaining unit from two classifications employees that would be represented by a union. *Boeing, supra,* slip op. at 1. That scenario is no different from the one here, where Petitioner seeks to add three classifications (Service Advisor, Floater Advisor, and Internal Advisor) to the CBA of the Machinists and the Teamsters. Characterizing those additions to union representation as "self-determination" does nothing to change the fact that classifications are sought to be added to union representation. And when petitioned-for employees are sought to be formed as an appropriate unit for collective bargaining purposes, as is the case here, *Boeing* governs the analysis and procedure for making that determination. The Regional Director is therefore bound by *Boeing*.

D. The Board reinstated the traditional Community-of-Interest standard for determining an appropriate bargaining unit and directed that a three-step analysis be used in making that determination.

Despite the RD's rejection of *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017) *PCC Structurals* reinstated the traditional community-of-interest standard for determining an appropriate bargaining unit in union representation cases. *Id*., slip op. at 1. In applying the community-of-interest standard, the Board has historically considered the following factors: "whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised." *Boeing, supra,* slip op. at 2 (citing to *PCC Structurals*, slip op. at 5, quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002)).

The Board has long given substantial weight to prior bargaining history and is reluctant to disturb units established by collective bargaining. *Boeing, supra,* slip op. at 2. In appropriate unit determinations, the Board affords "significant weight" to prior bargaining history such as this establishing that a group of employees have historically been excluded from an existing unit. *See Michigan Bell Telephone,* 192 NLRB 1212, 1213 (1971) (no history of bargaining for commercial department employees relevant factor in appropriate unit determination). *See also, ADT Security Services, Inc.,* 355 NLRB 1388 (2010) (prior bargaining history given significant weight in appropriate unit determinations); *CHS, Inc.,* 355 NLRB 914, 916 (2010) (historical exclusion from existing unit relevant factor in UC petitions); *Teamsters United Parcel Service National Negotiating Committee,* 346 NLRB 484, 485 (2006) (previously unrepresented employees may not be accreted into existing unit where the group sought has been in existence and historically excluded from the unit). When weighing the factors in determining the community of interest, the Board never addresses, solely and in isolation, the question of whether the employees in the unit sought have interests in common with one another. *Boeing, supra,* slip op. at 2. The inquiry necessarily proceeds to a further determination of whether the

interests of the unit group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit. *Id*., slip op. at 2-3.

"The required assessment of whether the sought-after employees' interests are sufficiently distinct from those of employees excluded from the petitioned-for group provides some assurance that extent of organizing will not be determinative, consistent with Section 9(c)(5); it ensures that bargaining units will not be arbitrary, irrational, or 'fractured'—that is, composed of a gerrymandered grouping of employees whose interests are insufficiently distinct from those of other employees to constitute that grouping a separate appropriate unit; and it ensures that the Section 7 right of excluded employees who share a substantial (but less than 'overwhelming') community of interests with the sought-after group are taken into consideration." *PCC Structurals, supra,* slip op. at 5.)

The Board's inquiry necessarily begins with the petitioned-for unit; if that unit is appropriate, then the inquiry into the appropriate unit ends. *Boeing, supra,* slip op. at 3. However, in determining whether the petitioned-for unit is appropriate, the Regional Director shall consider both the shared and the distinct interests of petitioned-for and excluded employees. *Ibid*. The community-of-interest analysis must consider whether excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with the included employees. *Ibid*. This is exactly what the RD refused to do in her DDE and Decision.

The Board in *Boeing* set forth a three-step process for applying the above legal principles in determining an appropriate bargaining unit under its traditional community-of-interest test. The RD did not apply this 3-step test at all. "First, the proposed unit must share an internal community of interest. Second, the interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit must be comparatively analyzed and weighed. Third, consideration must be given to the Board's decisions on appropriate units in the particular industry involved." *Boeing, supra,* slip op. at 3.

1. Step One – The proposed unit must share an internal community of interest.

"The first step requires identifying shared interests among members of the petitioned-for unit. Thus, the traditional community-of-interest standard is not satisfied if the interests shared by the petitioned-for employees are too disparate to form a community of interest within the petitioned-for unit. In sum, the analysis logically begins by considering whether the petitioned-for unit has an internal community of interest using the traditional criteria discussed above. A unit without that internal, shared community of interest is inappropriate." *Boeing, supra,* slip op. at 3, quotation marks and citations omitted.

2. Step Two – The interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit must be comparatively analyzed and weighed.

The second step requires a comparative analysis of excluded and included employees. *Boeing, supra*, slip op. at 4. The Board has stressed that it is not enough to focus on the interests shared among employees within the petitioned-for group. *Ibid.* Instead, the inquiry must also consider whether excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members. *Ibid*. The fact that excluded employees have some community-of-interest factors in common with included employees does not end the inquiry. *Ibid.* The Board must determine whether the employees excluded from the unit have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members. *Ibid.* If those distinct interests do not outweigh the similarities, then the unit is inappropriate. *Ibid*.

This inquiry does not require that distinct interests must outweigh similarities by any particular margin, nor does it contemplate that a unit would be found inappropriate merely because a different unit might be more appropriate. *Boeing, supra,* slip op. at 4. What is required is an analysis of the distinct and similar interests as to why, taken as a whole, they do or do not support the appropriateness of the unit. *Ibid*. Explaining why the excluded employees have distinct interests in the context of collective bargaining is necessary to avoid arbitrary lines of demarcation.

3. Step Three - Consideration must be given to the board's decisions on appropriate units in the particular industry involved.

The traditional community-of-interest standard includes, where applicable, consideration of guidelines that the Board has established for specific industries with regard to appropriate unit configuration. *Boeing, supra,* slip op. at 4. These guidelines are appropriately considered at the third and final step of the community-of-interest analysis. *Ibid*.

E. The Union is trying to create a fractured unit.

Step One requires that the proposed unit share an internal community of interest. The Board "does not approve fractured units, *i.e.*, combinations of employees that are too narrow in scope or that have no rational basis." *Seaboard Marine, Ltd.,* 327 NLRB 556 (1999).

Here, Petitioner's proposed unit consists of six (6) Service Advisors, two (2) Floater Advisors, and one (1) Internal Advisor, William Ortega. Petitioner and Employer stipulated that the Service Advisors and the Floater Advisors share a community of interest. (HT 120:5-12.) Thus, the issue is whether the service and Floater Advisors, on the one hand, and the Internal Advisor, on the other hand, share an internal community of interest. As shown below, they do not.

The following analyzes those factors that strongly that the service and floating advisors do not share an internal community of interest with the Internal Advisor.

1. There is no specific training for the Internal Advisor, while there is training for Service Advisors.

There is no specific training for Ortega's position as Internal Advisor, while there is training for Service Advisors. (HT 168:4 – 169:5.) Ortega has not had any additional training to be an Internal Advisor. (HT 169:1-2.)

2. The Service Advisors, as a group, are customer-facing employees who sell to customers, while the Internal Advisor is just that – he works with the new and used car departments on internally-owned (inventory) vehicles.

Service Advisors sell to customers as their sole job duty. (HT 150:10-17.) Ortega, the Internal Advisor only rarely deals with customers and only where the customer has to have something done that was sold by the new or used car departments. (*Ibid.*) It has "been a couple

of years" since he was asked to do customer pay work. (*Ibid.*) Even when there were not as many Service Advisors as there are now, Ortega still did not do customer pay work that often – maybe "a couple of times a year." (HT 150:21-24.) His supervisor has never placed Ortega to fill in for a Service Advisor. (HT 66:22-23.)

Whereas the Service Advisors help external customers, Ortega, as the Internal Advisor, helps the internal customers, which is always the new and used car sales department. (HT 77:7-13.) Service Advisors general profit from paying customers. The Internal Advisor does not—he only generates expenses to the dealership. (HT 188:24 – 189:15.)

Ortega has been the Internal Advisor, and the only Internal Advisor, for ten years. (HT 178:11 – 179:10.) As an Internal Advisor, he deals with the in-house used or new car departments in terms of shepherding inventory through the process of getting the vehicles ready to put into inventory for sale. (HT 179:25 – 180:3.) The new and used departments instruct Ortega what needs to be done for customers based on pre-sold items. (HT 180:6-14.) Also, the sales department makes the decisions on what work will be performed on cars by outside vendors, or "sublets". (HT 182:3-12.) Ortega is merely the clerical employee that takes care of that. (HT 188:4-23.) He is an "order-taker" not a salesperson. (HT 182:7 – 193:6.)

Ortega, as the Internal Advisor, is the only advisor who handles the paperwork for the reconditioning of used cars, which is the process of taking a used car that is received from a third-party source and turned into something that is ready for sale. (HT 185:19 – 186:15.) During the process, Ortega is the only one who handles sublets for used cars. (HT 187:12 – 188:17.)

Ortega also is the only one who handles "due bills," on vehicles that have been purchased by a customer with some service sold by the new or used car department, which are services that are owed to the customer that have been paid by the dealership as part of the sales transaction. (HT 153:8-16.) The customer relations manager sets up appointments only for Ortega on due bills, and does not set up the appointments for another Service Advisors. (HT 185:10-16.)

With respect to the Floater Advisors, although they help out other advisors, they do not help out Ortega, the Internal Advisor. (HT 104:2-6.)

3. The Internal Advisor works closely with the Used Car Department, as sixty percent (60%) of his time is spent doing reconditioning of used cars.

Ortega sits next to the Used Car Manager behind the Cashiers. (HT 172:1-5.). His job location is not where the Service Advisors or Floater Advisors are located. (HT 30:5-24 and 31:19 – 32:2.) They are located in the Service Drive. (*Ibid*.) He is located in the office because the Used Car Manager has to authorize and sign the repairs orders written for used car reconditioning. (HT 172:6-19.) Ortega, as the Internal Advisor, is the only one who has the job of dealing with the used car manager for used car reconditioning. (HT 172:17 – 173:7.) No Service Advisor has that job. (*Ibid.*) Ortega has the same schedule as the Used Car Manager so that they can be at work at the same time. (HT 173:8-10.) Sixty percent (60%) of Ortega's time is spent doing shepherding the reconditioning of used cars. (HT 191:17-19.) Clerical employees and skilled employees simply do not share a community of interests. In fact, it was on this basis that the Board in *BF Goodrich Rubber Co.,* 55 NLRB 338 (1944), held that unskilled tool clerks should be excluded from a machinists voting group. In particular, the Board noted that, "they are unskilled employees performing essentially clerical duties." *Id*. at 345; *see also Mitchellace, Inc.,*314 NLRB 536 (1994); *Swift & Co.,* 166 NLRB 589, 590 (1967); *Westinghouse Electric Corp.,* 118 NLRB 1043 (1957) (citing cases and stating that the Board customarily excludes office clericals from a unit of production and maintenance workers); *California Cornice Steel & Supply Corp.,* 104 NLRB 787, 789 (1953) (office clericals customarily excluded from residual unit of production and maintenance employees); *Brown Instruments Division,* 115 NLRB 344, 348 (1956) (office clericals customarily excluded when a union seeks to add them to an existing production/maintenance unit); *Power Inc. v. NLRB.*, 40 F.3d 409, 420- 21 (D.C. Cir. 1994) ("Exclusion of office clericals from production units is consistent with long standing NLRB policy, and has repeatedly been upheld").21 The same applies with equal force here because the Service Advisors and Internal Advisor are not functionally integrated with the existing Machinists' bargaining unit and do not share a sufficient community of interest with it.

4. The Internal Advisor has infrequent contact with the Service Advisors and frequent, everyday contact with other employees such as the Cashiers.

Ortega only infrequently communicates with the Service Advisors. Usually, the only interaction is when a Service Advisor informs him there is a customer waiting for Ortega, or that a customer believes something should be covered under a plan or warranty that is not. (HT 167:7-24.) In contrast, Ortega interacts with the Cashiers and Used Car Manager every day. (HT 171:10-17.)

5. The Internal Advisor has terms and conditions of employment that are distinct from the Service Advisors.

Ortega's earnings are increased or decreased on how many new and used cars are sold by the Sales Department, not on his individual sales of service. (HT 182:20 – 183:3.)[2] In contrast, the Service Advisors are commissioned salespersons who receive more on commissions than from their hourly wage rate. (HT 95:11-22; and the Service Sales Advisor Compensation Program, received into evidence as E-1.) The Internal Advisor and the Service Advisors have a separate pay plan and the Service Advisors share a common pay plan. (HT 36:22 – 37:3 and 40:7-13; and E-1.) Having a pay plan that is different between the Internal Advisor and the other Service Advisor and Floater Advisors is the norm. (HT 40:10-13.)

For this year, the Service Advisors got a reduction in the percentage paid of their individual retail sales. (HT 205:19-21.) Ortega did not have any reduction. (HT 205:24-25.)

Ortega works a schedule different from that of the Service Advisors. (HT 75:15-17; and the Schedule for the Service Department, received into evidence as E-2.) He works a fixed schedule, Monday through Friday, 8 to 5, which is different from the schedule of the Service Advisors. (HT 75:20 – 76:1; and E-2.) *C & L Systems Corp.,* 299 NLRB 366, 386 (1990) (excluding clerk who maintained different working hours than production unit, wore office clothes, spent the majority of day doing paperwork unrelated to production work, and utilized skills different from production unit).

[2] The RD erroneously stated that the Internal Advisor is paid on the sale of new and used cars. That is not accurate. He is paid on the amount of sublet work sent out to third-party vendors, not on the sales price of the vehicles themselves.

F. In the context of collective bargaining, the distinct interests of the excluded employees do not outweigh the similarities with the petitioned-for employees.

Step Two requires an analysis of the distinct interests of the excluded employees in comparison to the similarities with the petitioned-for employees. The RD and the hearing officer flatly rejected this step of the required analysis. The petitioned-for unit, as stated above, includes six (6) Service Advisors, two (2) Floater Advisors, and one (1) Internal Advisor. Included employees (the employees covered by the CBA) are comprised of technicians, parts, porters, detailers, and shuttle drivers. (HT 67:13 – 68:17.) There are approximately fifty (50) individuals that are currently represented by the CBA. (HT 71:19 – 72:11.) If the petitioned-for unit is accepted, the excluded employees include five (5) Cashiers and one (1) Warranty Administrator.

The distinct interests of the excluded employees – the Cashiers and the Warranty Administrator, do not outweigh the similarities with the petitioned-for employees – the Service Advisors, the two Floater Advisors, and the Internal Advisor.

The following analyzes those factors that show that the distinct interests do not outweigh the similarities, and thus the unit is inappropriate.

1. The excluded employees and the petitioned-for employees are organized in the same department.

The excluded employees, the Cashiers and the Warranty Administrator, are in the same department as the petitioned-for employees, the Service Advisors, the Floater Advisor, and the Internal Advisor. (HT 24:4-20 and 28:20 – 29:17.) The service manager is Cathyrine Oliver and they all answer to her. (*Ibid.*) The technicians on the other hand report to the Shop Foreman, who does their discipline and evaluations. (HT 24:14-22 and 25:12-18.) The Parts technicians report to the Parts Manager, who in turn answers to Cathyrine Oliver. (HT 75:10-12.) *Constellation Power Source Generation, Inc.,* 05-RC-14906, et al., 2000 NLRB LEXIS 942 at *263 (Shuster, 2000) (having "separate immediate supervision from production and maintenance employees" a factor in decision to exclude customer service investigator from unit); *see also Judge & Dolph, Ltd.,* 33-CA-11482, 1997 NLRB LEXIS 352 at *71 (Pannier, III, 1997) (unlawful accretion based in part upon the separate immediate supervision between employee groups).

2. The excluded employees and the petitioned-for employees do the same type of white collar work, unlike the represented employees who do blue-collar work.

The excluded employees – the Cashiers and the Warranty Administrator – perform "white collar" work, meaning work that entails paperwork, computer work, and office work. (HT 58:19-59:2-9.) "Blue-collar" entails physical labor, such as detailing cars. (*Ibid.*) The represented employees, such as the technicians, do blue-collar work. (HT 60:8-11.) Customers interact with the Cashiers, not the technicians, to make payment and have their cars returned. (HT 61:22 – 62:1.) For a warranty payment from the factory, the Warranty Administrator works on obtaining payment, not the technicians. (HT 63:3-23.) Neither technicians nor those handling parts ever deal with customers to work out problems with their bills. (HT 65:2-7.) Technicians do not contact or interact with customers, or sell customers services or repairs. (HT 55:3-23 and 55:18-23.)

Mechanics are required to be certified. (HT 50:24-25.) They must obtain an ASE (Automotive Service Excellence) certification. (HT 51:1-16.) Lube techs or line techs, even though they do not initially have ASE certification, eventually obtain that certification as a normal progression in their careers. (HT 105:10-19.)

The Service Advisors, the Floater Advisors, and the Internal Advisor all do the same type of white collar work as the Cashiers and the Warranty Administrator, dealing with paperwork, working on computers, customer service, and sales, and not the type of blue-collar work of the technicians. (HT 58:17 – 60:7.) One hundred percent (100%) of Ortega's work is paperwork, or clerical and administrative. (HT 195:19 – 196:3.) Unlike the technicians, the advisors interact with the customers in getting their vehicles serviced and repaired. While it may seem odd that the Parts employees are included, they are so functionally integrated to the work of the technicians it only makes sense to have then included. The Parts technician physically find the parts needed by the technicians and physically give the parts to the technicians to be installed. (HT 77:18 – 78:5.)

3. The excluded employees are functionally integrated with the petitioned-for employees.

The Service Department is a functionally integrated department with a full process that begins with receiving a vehicle and ends with returning it to a customer or placing it on the lot for sale, with all the steps in between. (HT 34:14 ff.) When a customer brings in his or her vehicle, a porter greets the customer. (HT 34:14-18.) A Service Advisor comes out and goes over the needed services and tries to upsell. (HT 34:19 – 35:2.) A repair order (RO) is written up for what is to be done to the vehicle. (HT 36:3-10.) Although a greeter/porter usually does not involve the Internal Advisor, the Internal Advisor will be notified only when there is a "due bill", services that have already been pre-sold by the sales department. (HT 36:15-23.)

When Service Advisors are on duty, Cashiers need to be there as well. (HT 73:9-11.) The purpose for this duality is because the Cashiers need to be there to take the payments from the customers when they pick up their cars and to release the vehicles to the customer. (HT 73:24 – 74:2.)

The Cashiers and the Warranty Administrator are an integral part of the process of handling repair of a vehicle brought in by a customer and returning the vehicle to the customer. (HT 65:20 – 66:5.) And, as mentioned, the Service Advisors are the ones selling services to the customers.

All of the Service Advisors, Internal Advisor, Cashiers, Warranty Administrator, porters, and greeters wear the same black Polo shirts. (HT 41:19-22.) The technicians wear uniforms and safety equipment. (HT 41:23 – 42:2.)). *The Mirage Casino Hotel,* 338 NLRB 529, 531 (2002) (different uniforms a factor in decision to exclude craft employees from a unit of engineers).

4. The Service Advisors and the Internal Advisor have frequent contact with the Cashiers in particular.

As mentioned, Ortega sits next to the used car manager behind the Cashiers. (HT 172:1-5.) He is located there because the used car manager has to authorize the repairs orders written for used car reconditioning. (HT 172:6-19.) The Service Advisors and the Cashiers work in tandem, as the Cashiers need to be present to take payments from customers and have their cars delivered back to them. (HT 73:9 – 74:2.)

5. The excluded employees and petitioned-for employees have far more similar terms and conditions of employment than in comparison to the represented employees.

Union employees have their own pension and/or 401(k) plan. (HT 69:22:25; and E-3.) In comparison, the excluded employees and the petitioned-for employees have a company-sponsored 401(k) plan. (HT 70:4-13.)

Technicians keep their time by punching in and out on computers in the shop. (HT 112:22 – 113:10.) In contrast, the Cashiers and the Internal Advisor keep track of their time on their own computers. (HT 113:16-24.) The Cashiers, the Service Advisors, and the Internal Advisor all have their own computers. (HT 113:21 – 114:1.) Technicians do not have their own computers. (HT 114:2-3.)

Also, whereas Cashiers need to be present at the same time as the Service Advisors, this is not true of the technicians, who have different work schedules and start times. (HT 74:15-23.)

6. The excluded employees and the petitioned-for unit have the same supervisor.

Cathyrine Oliver is the service manager of Employer. (HT 24:4-5.) She oversees the Service Department, which include the Cashiers, Warranty Administrator, Service Advisors, Floater Advisors, the Internal Advisor, detailers, porters, and shuttle drivers. (HT 24:6-20 and 28:20 – 29:17.) She has one shop foreman, Todd Nankivell, whose sole supervisory capacity is over the technicians. (HT 24:18-22 and 25:14 – 28:11.) He has no supervisory responsibilities over any of the Cashiers, Warranty Administrator, Service Advisors, Floater Advisors, the Internal Advisor, detailers, porters, and shuttle drivers. (*Ibid.* and HT 28:20 – 29:17.)

Consequently, the excluded employees (Cashiers and the Warranty Administrator) and the petitioned-for unit (the Service Advisors, the Floater Advisors, and the Internal Advisor) all answer to the same supervisor – Cathyrine Oliver. In contrast, the technicians, who are part of the represented unit, answer to a different person, as do the parts employees.

G. The Board has historically excluded the type of white collar job classifications of the petitioned-for employees from the unit appropriate for collective bargaining purposes.

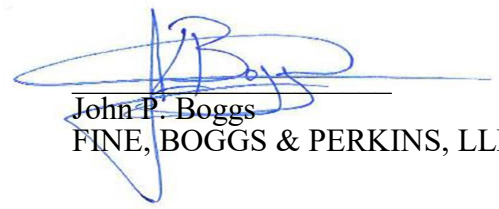
The last step is to consider any industry-specific guidelines applicable to this case. *Boeing, supra,* slip op. at 4. The NLRB has provided guidance for automotive service centers, in both *Montgomery Ward & Co.*, 150 NLRB 598 (1964) and *Bamberger's Paramus Div., Macy, R.H. & Co., Inc.,* 151 NLRB 748 (1965). In *Montgomery Ward*, the Board found a unit appropriate for collective bargaining purposes to include "mechanics, tire mounters, seat cover installers, stockmen, and gas island attendants", and excluded "all other employees, office clerical employees, Cashiers, salesmen, watchmen, guards, and supervisors". *Montgomery Ward, supra,* at 601-602. In *Bamberger's*, the Board found similarly that the appropriate unit included "tire installers, brakemen, front-end men, stockmen, and set cover men, but exclud[ed] all other employees, office clerical employees, salesmen, guards, and supervisors". *Bamberger's, supra,* at 752.

The petitioned-for employees here – Service, Floater, and Internal Advisors – obviously fit with the job classifications of office clerical employees, salespersons, and Cashiers that have historically been excluded by the Board from the appropriate unit. Allowing them to become part of the appropriate unit would contravene Board precedent.

IV. CONCLUSION

Based on the foregoing, Employer requests that the Board either dismiss the Petition as not being an appropriate bargaing unit or reverse the RD's Decision and DDE and remand to the RD to apply the correct legal standard in making her determination.

Respectfully Submitted,



John P. Boggs
FINE, BOGGS & PERKINS, LLP

Dated: April 8, 2020

CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of San Diego, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 16870 W. Bernardo Drive, Suite 360, San Diego, California 92127.

On April 9, 2020, I served the following documents in the manner described below:

EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION TO OPEN AND COUNT DETERMINATIVE CHALLENGED BALLOT AND DECISION AND DIRECTION OF ELECTION UPON WHICH IT WAS BASED

☒ **BY ELECTRONIC SERVICE**: by electronically mailing a true and correct copy through Fine, Boggs & Perkins' electronic mail system from kcherry@employerlawyers.com to the email addresses set forth below.

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I certify under penalty of perjury that the above is true and correct. Executed at San Diego, California on April 9, 2020.

/s/ Kathryn M. Cherry

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